



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 923**

**[Doc. No. AMS-SC-19-0049; SC19-923-1 FR]**

**Marketing Order Regulating the Handling of Sweet Cherries  
Grown in Designated Counties in Washington; Decreased  
Assessment Rate**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements a recommendation from the Washington Cherry Marketing Committee (Committee) to decrease the assessment rate established for the 2019-2020 and subsequent fiscal periods. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Dale Novotny, Marketing Specialist, or Gary Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone:

(503) 326-2724, Fax: (503) 326-7440, or Email:  
dalej.novotny@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@usda.gov.

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Order No. 923, as amended (7 CFR part 923), regulating the handling of sweet cherries grown in designated counties of Washington. Part 923 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of sweet cherry growers and handlers operating within the area of production.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175.

This final rule falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, Washington sweet cherry handlers are subject to assessments. Funds to administer the marketing order are derived from such assessments. The assessment rate will be applicable to all assessable Washington sweet cherries for the 2019-2020 fiscal period, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to a marketing order may file with USDA a petition stating that

the order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The Order authorizes the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. Committee members are familiar with the Committee's needs and with the costs of goods and services in their local area and can formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting where all directly affected persons have an opportunity to participate and provide input.

This final rule decreases the assessment rate from \$0.25 to \$0.20 per ton of Washington sweet cherries handled for the 2019-2020 and subsequent fiscal periods. The lower rate is necessary to fund the Committee's 2019-2020 fiscal period budgeted expenditures while maintaining the Committee's financial reserve fund at an amount not exceeding approximately one fiscal period's operational expenses. Based on input received from growers at an annual meeting, the 2019 crop of Washington sweet cherries is expected to be similar in volume compared to the 2018 crop. The Committee believes that decreasing the continuing assessment rate will allow the Committee to fully fund its 2019-2020 budgeted expenses and maintain its financial reserve within the limits established in the Order.

The Committee held a well-publicized meeting May 8, 2019, where all interested parties were encouraged to participate in the discussions. However, the Order's quorum requirement was not met, and the Committee was not able to conduct official business. The following day, the Committee conducted the vote by email and, with a vote of 15-1, recommended 2019-2020 fiscal period budgeted

expenditures of \$56,250 and an assessment rate of \$0.20 per ton of sweet cherries handled. In comparison, last year's budgeted expenditures were \$55,750. The assessment rate of \$0.20 is \$0.05 lower than the \$0.25 per ton rate currently in effect. The Committee recommended the assessment rate decrease because of a normal size crop estimate and a financial reserve fund balance that was higher than the Committee believes is responsible. At the recommended assessment rate and budgeted expenditures, the Committee expects its financial reserve to be \$55,093 at the end of the 2019-2020 fiscal period, which would be within the limits set in the Order.

The major expenditures recommended by the Committee for the 2019-2020 fiscal period include \$25,000 for program management contract services provided by the Washington State Fruit Commission, \$7,250 for administrative expenses, \$7,000 for regulation proceedings, \$5,000 for data management, \$5,000 for research, \$4,000 for an annual audit, and \$3,000 for travel. In comparison, these major expense categories budgeted for the 2018-2019 fiscal period were \$25,000, \$6,950, \$7,000, \$5,000, \$5,000, \$3,800, and \$3,000, respectively.

The assessment rate recommended by the Committee was derived by considering anticipated expenses, expected sweet cherry sales, and the amount of funds available in the authorized reserve. Expected income derived from handler assessments of \$40,000 (200,000 tons of sweet cherries at \$0.20 per ton), plus \$5 interest income and \$16,245 from the reserve would be adequate to cover budgeted expenses of \$56,250. Funds from the reserve (estimated to be \$71,338 at the beginning of the 2019-2020 fiscal period) will be used to supply part of the Committee's 2019-2020 expenses in an effort to keep the reserve within the maximum permitted by § 923.142(a).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA.

Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's budget for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

#### **Final Regulatory Flexibility Act**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 1,450 growers and 37 handlers

of sweet cherries in the regulated production area subject to regulation under the Order. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$30,000,000, and small agricultural producers are defined as those having annual receipts of less than \$1,000,000 (13 CFR 121.201).

According to data from USDA Market News, the 2018 season average f.o.b. price for Washington sweet cherries was approximately \$35.14 per 15-pound carton. The Committee reported that the industry shipped 3,964 tons for the season, which equals approximately 27,394,133 cartons (204,456 tons at a net weight of 15 pounds per carton). Using the number of handlers, and assuming a normal distribution, most handlers would have average annual receipts of more than \$30,000,000 (\$35.14 times 27,394,133 cartons equals \$962,629,845 divided by 37 handlers equals \$26,017,022 per handler).

In addition, based on USDA National Agricultural Statistics Service data, the weighted average grower price for the 2018 season was \$1,900 per ton of sweet cherries. Based on grower price, shipment data, and the total number

of Washington sweet cherry growers, and assuming a normal distribution, the average annual grower revenue is below \$1,000,000 (\$1,900 times 205,456 tons equals \$390,366,400 divided by 1,450 growers equals \$269,218 per grower). Thus, most growers of Washington sweet cherries may be classified as small entities, but most of their handlers may be classified as large entities.

This final rule decreases the assessment rate collected from handlers for the 2019-2020 and subsequent fiscal periods from \$0.25 to \$0.20 per ton of Washington sweet cherries handled. The Committee recommended 2019-2020 fiscal period expenditures of \$56,250 and the \$0.20 per ton assessment rate with an affirmative vote of 15-1. The one dissenting voter gave no reason for their opposition. The assessment rate of \$0.20 is \$0.05 lower than the rate for the 2018-2019 fiscal period.

The Committee estimates that the industry will handle 200,000 tons of fresh, Washington sweet cherries during the 2019-2020 fiscal period. Thus, the \$0.20 per ton rate should provide \$40,000 in assessment income. Income derived from handler assessments, along with \$5 interest

income and \$16,245 from the reserve, will cover all budgeted expenses.

The major expenditures recommended by the Committee for the 2019-2020 fiscal period include \$25,000 for program management contract services provided by the Washington State Fruit Commission, \$7,250 for administrative expenses, \$7,000 for regulation proceedings, \$5,000 for data management, \$5,000 for research, \$4,000 for an annual audit, and \$3,000 for travel. In comparison, these major expense categories budgeted for the 2018-2019 fiscal period were \$25,000, \$6,950, \$7,000, \$5,000, \$5,000, \$3,800, and \$3,000, respectively.

The lower assessment rate will cover most of the Committee's 2019-2020 fiscal period budgeted expenditures, with the remaining balance to come from the financial reserve. Decreasing the continuing assessment rate and using some funds from the reserve will allow the Committee to fully fund budgeted expenses and bring its financial reserve to a level that is compliant with the Order.

Prior to arriving at this budget and assessment rate, the Committee considered maintaining the current assessment rate of \$0.25 per ton. However, after grower input and

discussions at the May 8, 2019, meeting, the Committee projected the 2019 crop to be similar in volume to the previous year. This amount of production at the current assessment level of \$0.25 per ton would generate enough assessment income to fund the Committee's operations for the 2019-2020 fiscal period, but its financial reserve would be too high and not in compliance with the Order. Based on estimated shipments, the recommended assessment rate of \$0.20 per ton of sweet cherries should provide \$40,000 in assessment income. The Committee determined assessment revenue will be adequate to cover most of its budgeted expenditures for the 2019-2020 fiscal period, with the remaining balance coming from its financial reserve. Reserve funds will be kept within the amount authorized in the Order.

A review of historical data and preliminary information pertaining to the upcoming fiscal period indicates that the average grower price range for the 2019-2020 season should be approximately \$1,598-\$3,081 per ton of Washington sweet cherries. Therefore, the estimated assessment revenue for the 2019-2020 fiscal period as a

percentage of total grower revenue would be between 0.007 and 0.013 percent.

The Committee's meetings are widely publicized throughout the Washington sweet cherry industry. All interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the May 8, 2019, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Interested persons were invited to submit comments on this rule, including the regulatory and information collection impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581-0189, Fruit Crops. No changes in those requirements will be necessary because of this action. Should any changes become necessary, they will be submitted to OMB for approval.

This final rule will not impose any additional reporting or recordkeeping requirements on either small or large Washington sweet cherry handlers. As with all

Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the final regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the *Federal Register* on September 23, 2019 (84 FR 49682). Copies of the proposed rule were provided to all Washington sweet cherry handlers. The proposal was also made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending October 23, 2019, was provided for interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 923**

Marketing agreements, Fruits, Reporting and recordkeeping requirements, Cherries.

For the reasons set forth in the preamble, 7 CFR part 923 is amended as follows:

PART 923 - MARKETING ORDER REGULATING THE HANDLING OF SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

Authority: 7 U.S.C. 601-674.

2. Revise 923.236 to read as follows:

**§ 923.263 Assessment rate.**

On and after April 1, 2019, an assessment rate of \$0.20 per ton is established for the Washington Cherry Marketing Committee.

Dated: November 21, 2019.

**Bruce Summers,**

*Administrator,*

*Agricultural Marketing Service.*

*BILLING CODE 3410-02 P*

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